United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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To be argued by
STEVEN KIMELMAN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-1182, 76-1192

UNITED STATES OF AMERICA,
Appellee,

—*against*—

WILLIAM J. JOYCE, DONALD WALSH, JAMES GRIMSLEY, JANET TERRI and LOUIS BOVELL,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLEE

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BRIEF FOR THE APPELLEE

Preliminary Statement

William Joyce, Donald Walsh, Janet Terri, Louis Bovell and James Grimsley appeal from judgments of conviction of the United States District Court for the Eastern District of New York (Platt, *J.*) entered on January 29, 1976. After a jury trial on charges of possession of goods stolen from a foreign shipment, in violation of Title 18, United States Code Sections 659 and 2, and conspiracy to commit this substantive offense (Title 18, United States Code, Section 371), all of the above-named appellants were convicted on the substantive charge and all save appellant Grimsley were convicted on the charge of conspiracy. Appellant Joyce received concurrent sentences of 4 years for conspiracy and 8 years for possession, and was fined $10,000. Appellant Walsh received concurrent sentences of 4 years

for conspiracy and 5 years for possession, and was also fined $10,000. Appellants Terri and Bovell received concurrent sentences of 3 years for each offense, six months of which are to be served in prison, and 3 years of probation. Terri was fined $10,000 and Bovell was fined $4000. Appellant Grimsley received a sentence of 3 years for possession, 2 months of which are to be served in a jail type institution, and 3 years of probation. All appellants are currently free on bail pending appeal.[1]

Five issued are raised by the appellants. Grimsley and Bovell allege that the trial court's charge on the element of knowledge was error; Bovell additionally contends that his guilt was not proven beyond a reasonable doubt. Appellant Terri claims that the admission of certain utterances of her co-conspirators was error, and that she did not receive effective counsel. Finally, appellant Joyce alleges that the trial court erred in precluding him from offering extrinsic evidence to impeach the testimony of two Government witnesses.[2]

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[1] Also indicted were Edward Boyle, Thomas Burns, Leonard Nitti, Peter Areiter, and Robert Schoenly, all of whom pleaded guilty before trial and testified for the Government. Two other defendants, John Freudiger and Morton Hanan, pleaded guilty during the trial. Freudiger and Hanan did not testify for the Government.

Boyle received a sentence of 4 years, 2 months of which are to be served in prison, and 4 years of probation. Burns was given a 5 years suspended sentence and 3 years of probation. Nitti received a 3 year suspended sentence, 3 years of probation, and was fined $2500. Both Areiter and Schoenly were given 5 year suspended sentences and 5 years of probation; they were fined $3000 and $2500, respectively. Freudiger received a 1 year sentence, 6 months of which are to be served in prison, and 3 years of probation. Hanan was given a 1 year sentence, 3 months of which are to be served in prison, 3½ years probation, and was fined $1000.

[2] Appellant Walsh filed a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967). The Government has filed a motion to dismiss his appeal as frivolous, and so does not address in this brief the issues raised by him.

Statement of the Case

A. The Government Case

On the morning of March 17, 1975, approximately 42,000 Timex watches worth over $700,000 were stolen along with a Ryder Rental Truck from the Flying Tigers Airline terminal at John F. Kennedy International Airport (926, 928). The watches were part of a foreign shipment in transit from Taiwan to Middlebury, Connecticut (914). Appellant Joyce was employed at the time as a cargo handler for Flying Tigers Airlines. Although he was not assigned to unload the watches, Joyce admitted to Federal Bureau of Investigation Agents that he had opened one of the shipping containers of watches that morning to see whether it was "domestic" or "international" freight (796-797).[4]

Approximately two hours after the theft of watches was discovered, Joyce entered the Tic Toc Bar in Lynbrook, New York. He told the bartender, co-defendant Robert Schoenly, that he had made "a hit at the airport" and that the stolen goods were outside in a truck (82). While they were conversing, co-defendant Peter Areiter came into the bar. Joyce asked Areiter to take Joyce's car and drive a "friend" of his (never identified) back to the Flying Tigers terminal at Kennedy Airport. Areiter took Joyce's friend, who was waiting in the parking lot of the bar, to the airport, and then returned to the bar (273-274). During the course of the morning, Joyce left the Tic Toc Bar, and during this absence, his cousin, appellant Donald Walsh, arrived and spoke

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[3] All references are to the trial transcript unless otherwise indicated.

[4] Joyce was interviewed in the early afternoon on the day of the theft along with other employees of Flying Tigers Airlines. He denied any knowledge of the theft itself. (796-797).

to bartender Schoenly. Schoenly advised Walsh that Joyce had "gotten something from the airport" and Walsh replied that he knew of a place to store such merchandise (85). Later that afternoon, appellant Joyce returned to the Tic Toc Bar and conversed with Walsh, Areiter and co-defendant Thomas Burns. Joyce asked Areiter and Burns to meet at the bar that evening to help him move some boxes (275, 422).

At approximately 7:00 P.M. on the evening of the theft (March 17), appellant Walsh met with Areiter, Burns and appellant Bovell at the Tic Toc Bar. Bovell had been asked by Walsh to help him move some boxes on the promise that he "would be taken care of" for his labors (1093). These four individuals left the bar and stopped at Burns' place of employment a few blocks away to pick up a truck. Following Walsh's directions, they then proceeded to a large garage in Oceanside, New York, operated by the defendant Hanan (277-279, 424-427). Inside the garage was a Ryder Truck matching the description of the one stolen from Flying Tigers that morning (427-428). While Walsh stood by talking to Hanan, Areiter, Burns, and Bovell moved approximately 117 cartons containing the stolen watches from the Ryder truck to the truck Burns had brought (292-294, 305-306). After the load was transferred, Walsh directed Areiter, Burns and Bovell back to Lynbrook to the home of his girlfriend, appellant Janet Terri. The boxes were unloaded first into the livingroom and then into a basement playroom (296-297).

Sometime during the next few days, Joyce told Schoenly that the "hit" he made at the airport was in fact the stolen Timex shipment (85). On Friday, March 21, 1975, appellants Walsh and Terri came into the Tic Toc and spoke to Schoenly. Walsh told Schoenly that he

wanted to move the watches. Schoenly was instructed to go to Hub Truck Rental in Lynbrook and rent a truck which had been reserved by appellant Terri. Walsh gave Schoenly $100 as a deposit, whereupon Schoenly left the bar leaving Terri (a former barmaid at the Tic Toc) to tend the bar (88-89). Upon discovering that he would need an additional $75 to leave as a deposit for the truck, Schoenly returned to the Tic Toc and obtained this money from both Walsh and Terri. As instructed, he rented a "step-in van" type truck and parked it around the corner from appellant Terri's house (93).

On the evening of March 21, 1975, Schoenly met appellants Walsh, Bovell and co-defendant John Freudiger at the Tic Toc. These individuals then proceeded to appellant Terri's house where they removed the cartons of watches from the basement, placing them in the rental truck (97-98).[3] At Walsh's instruction, the defendant Schoenly drove the van to Island Park, New York and left it parked on the street (106).

On Monday, March 24, 1975, appellant Joyce contacted Burns and asked him to find a new location to store the stolen watches (436). Burns contacted co-defendant Leonard Nitti who agreed to store the merchandise in a garage next to his residence. Burns and Joyce delivered the watches to Nitti that evening. Appellant Joyce offered to pay Nitti $1000 for two days rental of the garage. Joyce also showed Nitti some of the watches and told him they had been taken from Kennedy Airport (541).

Earlier that same day, appellants Joyce and Walsh had gone to a bar owned by co-defendant Edward Boyle. There, appellant Joyce asked Boyle whether he could fence

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[3] The wrapping and labels originally surrounding the boxes had now been removed and placed in garbage bags which were also put in the rental truck (98-99).

the shipment of Timex watches stolen from the airport. Boyle agreed to do so (592).

On March 27, 1975, an undercover New York Port Authority detective, Joseph Giordano, posing as a potential buyer of the watches, called Boyle (593, 686). A meeting was arranged for that afternoon at a bar in Queens called "Ferrucci's". Boyle contacted Joyce and they, along with co-defendant Burns and a woman friend of Boyle's, went to the meeting (594, 688-689). At the bar, Boyle met alone with the detective but at one point went over to consult Joyce on the terms of the agreement (702).

Boyle, Giordano and Joyce finally agreed upon an arrangement to deliver one-half of the watches that evening to an auto body shop in Brooklyn. The downpayment was to be $25,000 (597, 692, 702).

Joyce thereafter instructed Boyle to get a driver and truck to move the merchandise (598). Boyle called appellant Grimsley and offered him $250 to move some watches. Grimsley asked Boyle if the watches were stolen, and he replied in the affirmative (599). That evening, appellant Joyce met Burns, Boyle and Grismley at Nitti's garage (601). Joyce told Burns and Grimsley to go and get Grimsley's truck and to pick up half of the watches at Nitti's garage (601).[6] After loading the watches, Grimsley and Burns rejoined Boyle and Joyce. They then arranged to meet at an auto body shop, selected by the undercover detective, to consummate the sale (602).

Upon arriving at the auto body shop, Burns and appellant Grimsley proceeded to unload the watches. They were

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[6] Joyce had previously given Burns a loaded pistol because, not knowing Grimsely, he was afraid of a "rip off" (467).

joined shortly by Boyle, the detective Giordano and appellant Joyce (474-475).[7] Detective Giordano then passed the $25,000 to Joyce whereupon other officers, engaged in a surveillance capacity, moved in and arrested Boyle, Burns, Grimsley and Joyce (695-696).

Following their arrest, Boyle, Burns and Grimsley made complete statements to the Federal Bureau of Investigation detailing their participation. Appellant Grimsley admitted to Special Agent George Van Nostrand of the Federal Bureau of Investigation that he knew the watches were stolen (725). Appellant Bovell also gave oral statements to the Federal Bureau of Investigation but denied any knowledge that he was involved with stolen merchandise (1094-1095).

B. The Defense Case

Appellants Bovell and Grimsley testified in their own behalf. Bovell confirmed that they moved watches on both March 17 and March 21 at the request of appellant Walsh. His testimony completely corroborated that of Burns, Areiter, and Schoenly as to the events of those days (1172-1173, 1188, 1201). Bovell, however, emphatically denied any knowledge of either the contents of the cartons or the fact that they were stolen (1170-1171, 1197, 1207). He also insisted that not only had he never asked anyone what was in the cartons, but to the contrary, he was not even curious as to their contents (1170-1171, 1197, 1207). Bovell was told by Walsh that he "would be taken care of" for his work (1170).[8]

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[7] Additional detectives dressed as mechanics were also present.

[8] Schoenly was also told the same thing by Joyce. Moreover, Joyce promised Burns and Areiter approximately $3000 each for their assistance (298, 476).

Grimsley also corroborated the testimony of Boyle and Burns as to the events of March 27 (1029-1052). He denied, however, that Boyle had told him that (i) the watches were stolen; or (ii) he would be paid $250. According to Grimsley, no specific payment was ever discussed (998-999). Grimsley also denied telling Special Agent Van Nostrand that he knew he was transporting stolen merchandise (1009).

Appellants Walsh, Terri and Joyce did not testify. A stipulation was entered into evidence, however, to the effect that appellant Terri was in Massachusetts on March 17 and 18, 1975 and that the two family house occupied by her and her parents was in fact owned by her parents (1262-1263).

Appellant Joyce called eight witnesses. These included five character witnesses and one "alibi" witness who testified that he saw appellant Joyce in the Tic Toc Bar on March 24, 1975 at approximately the same time that Nitti and Burns had stated that Joyce was with them at Nitti's house (988-999). Two additional witnesses were called by appellant Joyce but were not permitted to testify over the United State's objections. The first of these witnesses purportedly would have testified that co-defendant Schoenly had lied when he opened his direct testimony by stating that he was recently married (1234-1237). The second witness allegedly had proof that co-defendant Boyle had lied when he denied that he had been fired from a previous employment (1237-1239).

ARGUMENT

POINT I

The Court Did Not Err in Giving the "Conscious Avoidance" Instruction.

At the trial the court instructed the jury, *inter alia*:

> [O]ne of the critical questions is whether the defendants knew they had possession of stolen watches. Actual knowledge that a defendant received and then possessed stolen watches is one of the essential elements of the offense charged.
>
> You may not find a defendant guilty unless you find beyond a reasonable doubt that he or she knew that he or she received and was then in possession of stolen merchandise. The fact of knowledge may be established by direct or circumstantial evidence just as any other fact in the case. Knowledge may be proven by a defendant's conduct since we have no way of looking into a person's mind directly.
>
> Two of the defendants have flatly testified that they had no such knowledge. *Now, in this connection bear in mind that one may not willfully and intentionally remain ignorant of a fact, important and material to his conduct, in order to escape the the consequences of the criminal law.*
>
> *If you find from all the evidence beyond a reasonable doubt that any defendant believed he or she received and was then in possession of stolen watches and deliberately and consciously tried to avoid learning that the watches in question were stolen in order to be able to say, should he or she be apprehended, that he or she did not know, you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.*

In other words, you may find that any defendant acted knowingly if you find that either he or she actually knew that he or she had received stolen watches or that he or she deliberately closed his or her eyes to what he or she had every reason to believe was the fact.

I should like to emphasize, ladies and gentlemen, that the requisite knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant.

One of the elements of the crime charged is that the accused knew that the Timex watches he, she or they possessed were stolen. As I have already instructed you, that must be proven beyond a reasonable doubt.

Knowledge is something that you cannot see with the eye or touch with the finger. It is seldom possible to prove it by direct evidence. The government relies largely on circumstantial evidence in this case to establish knowledge.

In deciding whether a defendant knew the Timex watches were stolen, you should consider all the circumstances, such as how a defendant handled the transaction, how he, she or they conducted himself, herself or themselves. Do his, her or their actions betray guilty knowledge that he, she or they were dealing with stolen watches or are the actions those of a duped, innocent man or woman or one who is just acting negligently or carelessly.

Guilty knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant.

Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is a fact.

> *The element of knowledge may be satisfied by proof that a defendant deliberately closed his or her eyes to what otherwise would have been obvious to him or her.* (1475-1478) (emphasis added).

Appellants Bovell and Grimsley argue that the emphasized portions of the above stated charge constitute error.

Construing "knowingly" in a criminal statute to include blindness to the existence of a fact is not a radical concept. *United States* v. *Sarantos*, 455 F.2d 877, 881 (2d Cir. 1972). The "conscious avoidance" charge helps to prevent an individual from circumventing criminal sanctions merely by deliberately closing his eyes to the obvious risk that his conduct is unlawful. *Ibid.*

The propriety of the "conscious avoidance" or "studied ignorance" charge is well established in this Circuit. As appellant Grimsley concedes, every underlined portion of the charge set forth herein has been referred to and approved by this Court (appellant Grimsley's brief at 9). *United States* v. *Olivares-Vegas*, 495 F.2d 827 (2d Cir.), *cert. denied*, 419 U.S. 1020 (1974); *see also United States* v. *Joly*, 493 F.2d 672 (2d Cir. 1974); *United States* v. *Jacobs*, 475 F.2d 270 (2d Cir.), *cert. denied sub nom. Lavelle* v. *United States*, 414 U.S. 821 (1973); *United States* v. *Natelli*, 527 F.2d 311, 322-23 (2d Cir. 1975).[9] Both appellants argue, however, that a "conscious avoidance" charge was not warranted under the facts of this case.

The salient common element in the cases cited above is the *denial of wrongful knowledge* by a defendant in spite of circumstances which should have apprised him of the unlawful nature of his conduct. A short review of the facts of the instant case will quickly demonstrate, contrary to the assertions of appellants Bovell and Grims-

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[9] Appellant Bovell's brief falls to cite any of these cases.

ley, the correctness of the disputed charge. On the evening of March 17, the very day of the theft, appellant Bovell was asked to move some boxes by appellant Walsh on the assurance he would be "taken care of" for his labor. After working a full day, Bovell proceeded to a garage and transferred 117 boxes prominently labelled "Flying Tigers Airlines" from a rental truck to a second truck brought by co-defendant Burns. He then proceeded to the home of appellant Terri and unloaded these same boxes first into the living room and then into a basement playroom of that house (1169-1182). Appellant Bovell insisted on the stand, however, that he did not notice that each box had a large "Flying Tigers Airline" label on it.[10] Moreover, he did not ask nor was he curious as to what he was moving; why he was moving it; or even exactly how much he was to be paid.[11] If this was not enough, four evenings later, he moved the same boxes (minus the wrappings) from appellant Terri's home to still another rental truck (1205-1209). On cross-examination, appellant Bovell continued to insist that he had never asked nor was he ever curious as to what was going on (1170-1177, 1197, 1207). Such denials in the face of the above stated circumstances clearly warrant a "conscious avoidance" charge.

Appellant Grimsley issued similar denials from the witness stand. According to Grimsley, co-defendant Boyle called him and asked him to move some boxes in return for a "few bucks". Grimsley claimed that Boyle did not tell him nor did he ask what was being moved or why. After working a full day, Grimsley met Boyle, Joyce and Burns at a bar.[12] He left with Burns and picked up

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[10] Bovell could not very well have admitted that he saw the "Flying Tigers" labels because he conceded that he knew appellant Joyce worked for that airline (1181, 1305-1306).

[11] As noted previously, co-defendants Burns and Areiter were offered approximately $3000 for similar exertions (298, 476).

[12] Grimsley had not met either Joyce or Burns previously (1011-1012).

half of the boxes and then drove for almost an hour to an auto body shop in Brooklyn. Grimsley denied ever asking anyone as to what was going on. He also denied being the slightest bit curious as to what he was moving or why these boxes were being delivered at night to a garage in Brooklyn (1029-1052). This testimony also warranted a "conscious avoidance" charge so that the jury could properly determine whether appellant had "deliberately closed his eyes [or her eyes] to what otherwise would have been obvious to him" (1478). The necessity for such a charge is even more compelling when one considers the testimony of co-defendant Boyle and Federal Bureau of Investigation Agent Van Nostrand. Boyle testified that he offered Grimsley $250 (not a "few bucks") and specifically told him that he would be moving stolen watches (599). Furthermore, Agent Van Nostrand testified that Grimsley admitted knowing he was moving stolen goods because of all the surrounding circumstances (725). This testimony must be balanced against Grimsley's denials that he knew that he was engaged in any unlawful conduct. The jury was thus able to fully evaluate the credibility of appellant Grimsley in the light of the underlying circumstances and his admissions at the time of his arrest. A "conscious avoidance" charge was therefore proper in all respects.

POINT II

The Guilt of Appellant Bovell Was Established Beyond a Reasonable Doubt.

Appellant Bovell asserts that the evidence was insufficient to establish his guilt on either the substantive or the conspiracy count. Bovell's attack on his conviction on the substantive charge is framed in terms of insufficient evidence of "guilty knowledge". As discussed at some length *supra*, "conscious avoidance" of knowl-

edge is the equivalent of guilty knowledge. The same facts that established the appropriateness of the "conscious avoidance" charge were more than sufficient to support the inference of Bovell's guilty knowledge by the jury. *See* Point I, *supra*.

Appellant Bovell further contends that his guilt on the substantive charge could not be found beyond a reasonable doubt because his explanation of his possession "might reasonably be true" (appellant Bovell's brief at 18). This formulation clashes head-on with the fundamental role of the jury as the trier of fact. This Court does not weigh evidence or determine the credibility of witnesses as part of its appellate review. Instead, the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Although Bovell's explanation may have seemed "reasonable" from his viewpoint, the jurors undoubtedly rejected his denials of knowledge as completely unbelievable in light of the underlying circumstances. It cannot be said at this juncture that the jury's conclusion is out of line with the substantial evidence, set forth *supra*, of Bovell's guilt.

In arguing that the evidence was insufficient to convict him on the conspiracy count, appellant Bovell again asserted that there was no evidence that he either knew the cartons were stolen, or that he entered into any agreement to commit the substantive offense.

The agreement to commit a substantive crime need not be formal. *Glasser* v. *United States*, *supra*; *United States* v. *Ragland*, 375 F.2d 471 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-816 (1946). Indeed, the fact of the agreement must often be inferred from

the conduct of the parties or other circumstances, as well as from the exchange of words. Where the underlying circumstances indicate that in some manner, positively or tacitly, the conspirators came to a mutual understanding to accomplish an unlawful plan, a finding that a conspiracy existed is justified. *Ibid.* It is not necessary that each co-conspirator know all of the details of the conspiracy, or all of his fellow co-conspirators. *United States* v. *McKnight*, 253 F.2d 817, 819 (2d Cir. 1958). There must be, of course, some overt act committed in pursuance of the agreement. *United States* v. *Agueci*, 310 F.2d 817, 828 (2d Cir. 1962), *cert. denied sub nom. Guippone* v. *United States*, 372 U.S. 959 (1963). As set forth previously, there is no question as to Bovell's active participation on both March 17 and March 21, 1975 (1169-1182, 1205-1209). His unbelievable denials contrasted against the surrounding circumstances more than justify the inference of an unlawful agreement. The verdict of the jury that Bovell was guilty of conspiracy, like the verdict regarding the substantive crime, must be sustained if, taking the view most favorable to the Government, there is substantial evidence to support it. There was clearly such a quantum of evidence here.

POINT III

The Utterances of Appellant Terri's Co-Conspirators Were Properly Admitted in Evidence.

Appellant Terri argues that the trial court improperly admitted in evidence hearsay statements of her alleged co-conspirators, because the Government failed to adduce sufficient non-hearsay evidence of her participation in the conspiracy. It is a well recognized exception to the hearsay rule that the declarations of one conspirator may be used against another conspirator not present, if the declarations

were made during the course of and in furtherance of the conspiracy charged. *Lutwak* v. *United States*, 344 U.S. 604, 617, *reh. denied*, 345 U.S. 919 (1953); *Anderson* v. *United States*, 417 U.S. 211, 218 (1974). Such hearsay evidence may only be admitted against a particular defendant, however, where there is independent non-hearsay evidence of the existence of the conspiracy and the defendant's participation therein. *Glasser* v. *United States*, *supra*, at 74. This Circuit has adopted the rule that in order for hearsay evidence to be admitted under the co-conspirator exception, the defendant's participation in the conspiracy must be established by a "fair preponderance" of independent non-hearsay evidence. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970).

The independent non-hearsay evidence which is required to support the admission against a defendant of hearsay statements of an alleged co-conspirator may be totally circumstantial, *United States* v. *Ragland*, *supra*, at 477, and the judge is permitted, in making his determination as to the sufficiency of the independent evidence, to draw such inferences as the established facts permit. *See United States* v. *Padilla*, 374 F.2d 996, 998 (2d Cir. 1967); *United States* v. *Santana*, 503 F.2d 710 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974).

There was sufficient non-hearsay evidence here to establish appellant Terri's participation in the conspiracy. There was uncontradicted testimony that the stolen watches were in a basement playroom of her house for 4 days from March 17 to March 21, 1975. Although counsel stipulated that she was in Massachusetts on March 17th and 18th, the watches remained in her house after

her return.[13] Moreover, co-defendant Schoenly testified that appellant Walsh in Terri's presence instructed him to rent a truck that Terri had already reserved. Terri also gave Schoenly some money in order to put a deposit on the truck (88-93). Finally, Terri was present with appellants Walsh and Joyce when Schoenly was advised by them to not cooperate with the Government by pleading the Fifth Amendment before the grand jury investigating the theft of the watches (126-128). Clearly, the foregoing furnished ample basis for "inferring that [Terri] . . . knew about the enterprise and intended to participate in it or to make it succeed." *United States* v. *Cirillo*, 499 F.2d 872, 883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).[14]

The evidence set forth above was admissible either as circumstantial evidence showing association between appellant Terri and her co-conspirators, *United States* v. *Bennett*, 409 F.2d 888, 895 n.6 (2d Cir.), *cert. denied sub nom. Haywood* v. *United States*, 396 U.S. 852, *reh. denied*, 396 U.S. 949 (1969); *United States* v. *Cusumano*, 429 F.2d 378, 381 (2d Cir.), *cert. denied sub nom. Riggio* v. *United States*, 400 U.S. 830 (1970), or as non-verbal acts. As emphasized by Judge Friendly in *United States* v. *Geaney*, *supra*, the acts of a co-conspirator "stand on quite a different basis" from utterances. *United States* v. *Geaney*, *supra*, n.3 at 1120. More specifically, since they are not intended to be a means of expression, these acts are not treated as hearsay and are admissible to prove the existence of a conspiracy. *Lutwak* v. *United States*, *supra*, at 617-619. Appellant Terri's acts help to establish that

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[13] While in appellants house, several cartons of watches were opened and all of the wrapping material was removed (98-99).

[14] The non-hearsay evidence is pursuasive proof of appellant Terri's role in the conspiracy; she was clearly not a mere bystander. *United States* v. *Santana*, *supra*, at 713-15.

the existence of the conspiracy was more probable than its non-existence, and so establish Terri's place in the conspiracy by a fair preponderance of the non-hearsay evidence. *See* McCormick, *Evidence* 794 (2d ed. 1972). Thus, the judge properly permitted the jury to consider the utterances of appellant Terri's co-conspirators in determining her guilt on the substantive and conspiracy counts.

POINT IV

Appellant Terri Was Not Deprived of Her Constitution Right to Effective Counsel.

Appellant Terri also asserts that she was deprived of her Constitutional right to effective counsel. Although she contends that her trial counsel's performance was "... incompetent and ineffective, with prejudicial effect" (appellant Terri's brief at 26), Terri fails to cite a single Second Circuit case in support of these conclusions.

This Court has, for a least a quarter of a century, adhered uniformly to stringent requirements for establishing a claim of ineffective assistance of counsel. *Lunz* v. *Henderson*, 533 F.2d 1322 (2d Cir. 1976). In one of the earliest cases setting forth these requirements, this Court stated:

> [T]ime consumed in oral discussion and legal research is not the crucial test of the effectiveness of counsel.
>
> A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice." *United States* v. *Wright*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950).

Other expressions of the Second Circuit requirements are quoted in *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973) and include " . . . before we may vacate a conviction there must be a *'total failure to present the cause of the accused in any fundamental respect'*." *United States* v. *Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963) (emphasis added); and "for there to be a lack of compliance with the fundamental fairness essential due to process, counsel's representation must be so *'horribly inept'* as to amount to 'a breach of his legal duty faithfully to represent his client's interests'." *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 109 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971) (emphasis added).

Rigorous standards for establishing counsel's ineffectiveness are necessary because a losing defendant will naturally find fault with his or her attorney and because good lawyers may differ on what constitutes effective trial strategy and advocacy. Competent decisions on these matters often involve judgments not easily evaluated outside the context of the trial. *See* Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 Harv. L. Rev. 1434, 1435 (1965). Application to this case of the law of other jurisdictions put forth by appellant Terri would abandon the venerable standards affirmed by this Court as recently as February, 1976 in *Lunz* v. *Henderson*, *supra*, and would ignore the spectrum of individual styles inherent in, and perhaps necessary to, our system of jurisprudence.

The record clearly shows that appellant Terri enjoyed effective counsel as determined by Second Circuit standards.

Marshall Kaplan was assigned to represent appellant Terri because her original counsel was apparently unavoidably engaged in a murder trial in State Court (26). In response to a question by the trial court, Mr. Kaplan

indicated that he felt he was capable of representing appellant Terri on short notice (6). The judge told appellant Terri that Mr. Kaplan is "a very able attorney" (26) and "has a very fine reputation" (29). When Terri asked for additional time to consult with Kaplan before the trial commenced, the request was granted immediately (6). Although appellant Terri later complained about Mr. Kaplan's method of jury selection, she admitted that he was competent (28). It is significant that after this early exchange (28), Terri at no time during the course of the eight day trial made any further comments regarding the effectiveness of counsel.

Appellant's brief makes much of the fact that Mr. Kaplan was appointed to represent her on January 16 for a trial which began January 19 and lasted 8 days. Among the cases appellant Terri cites in support of her argument that Mr. Kaplan's appointment was not timely is *United States* v. *Helwig*, 159 F.2d 616, 618 (3d Cir. 1947), which she quotes (appellant Terri's brief at 12) as stating:

> We are of the opinion that counsel for an indigent defendant, held in custody, must be appointed by the court sufficiently far in advance of trial to enable counsel adequately to prepare the defense. In the case at bar the period given for preparation was too brief.

As this Court noted in *United States* v. *Wright*, *supra*, at 379 note 4, counsel in *United States* v. *Helwig* was appointed only 1 minute before the trial. The Second Circuit went on to state that "[e]ach case, however, must be examined individually . . ." and "[w]hether the time for consultation was enough should depend on the nature of the case". *Id.* at 379.

The Government submits that counsel and his client were afforded sufficient time to consult. To begin with,

the issues in the case were hardly complicated. Moreover, appellant's brief gives little suggestion as to how Mr. Kaplan should have used the consultation time, insisting instead that the amount of time available was of itself prejudicial. As noted, that argument does not meet this Circuit's requirements set forth *supra* for establishing counsel's ineffectiveness in this regard.

Appellant Terri also characterizes Mr. Kaplan's unavoidable but brief absence from the trial as "objectionable" (appellant Terri's brief at 19), even though she formally consented to it after a protracted discussion with the trial judge (285). Prior to her consent, the judge offered 3 times to compel Mr. Kaplan's attendance and there was considerable discussion of the implications of the absence between Mr. Kaplan, the judge, and Assistant United States Attorney Kimelman, in Ms. Terri's presence (282-285). Furthermore, there was no direct testimony offered against Terri during this absence.

From her perspective as a convicted and sentenced defendant, appellant Terri now attacks, for the first time on appeal, Mr. Kaplan's failure to call her and her father as witnesses. These claims are easily disposed of. Unlike appellants Bovell and Grimsley, appellant Terri would have a difficult time denying guilty knowledge since the goods were stored in her house for 4 days. Further, her relationship with appellant Walsh would subject her to extensive cross-examination regarding her participation in the conspiracy (1188). As to her father, appellant's trial counsel had been given a copy of Mr. Terri's statements to the Federal Bureau of Investigation. In these statements, appellant's father claimed he told his daughter

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[15] Pursuant to Rule 16(e) of the *Federal Rules of Criminal Procedure*, a copy of a statement by Ms. Terri's father to the FBI on April 18, 1975 was presented to Mr. Kaplan. This statement is reproduced in the Government's Appendix, *infra*.

to remove the cartons from his house because there was "something wrong with them".[13] The decision not to call appellant's father as a defense witness is therefore not difficult to comprehend.

Despite appellant's contentions, even a cursory examination of the trial record indicates that Mr. Kaplan represented Janet Terri with some vigor. His objections throughout the trial manifested his strategy, previously noted by the trial judge (27-28), of keeping a "low profile" by dissociating Ms. Terri from the other defendants in the eyes of the jury. This theme was introduced by Mr. Kaplan's opening statement that ". . . the government has one table and everyone else has another table. That doesn't mean we choose to sit together or even that we wanted to" (62) and echoed until the end of his summation. He did conduct vigorous cross-examinations, however, of several of the Government's accomplice witnesses. Mr. Kaplan apparently believed that the evidence against Ms. Terri was "extremely thin" and so stated when he moved to dismiss each count of the indictment against Ms. Terri, after the Government rested (942). Additionally, Mr. Kaplan moved for a directed verdict after the defense rested.

An attorney must act on the facts before him and balance the merits of the case when plotting a defense. Here, Mr. Kaplan's actions cannot be deemed an abandonment of appellant Terri's interests, but were, instead, a valid courtroom representation. As this Court stated in *United States ex rel. Marcelin, supra*, at 45, "[i]n short, whatever failure there may have been on the part of petitioner's counsel to investigate—if under all the circumstances this can fairly be said to have been a failure at all—. . . *it did amount to a failure of constitutional magnitude*" (emphasis in original).

POINT V

The Court Properly Precluded Appellant Joyce From Impeaching The Testimony of Two Government Witnesses By Extrinsic Evidence.

Appellant Joyce claims reversible error based on the trial court's refusal to allow testimony which supposedly would have impeached the credibility of two of the Government's accomplice witnesses. One proffered witness allegedly would have testified that the witness Schoenly lied when, by way of background testimony, he stated that he was recently married. The second proffered witness would allegedly have presented some type of unspecified proof that Government witness Boyle had lied when he said he was laid off from a former employment (1234-1239). The United States contends that this impeaching testimony was clearly collateral in nature and therefore subject to the trial court's reasonable discretion.

The Second Circuit rule with regard to impeachment on collateral matters is set forth in *United States* v. *Blackwood*, 456 F.2d 526, 531 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972):

> A witness may be impeached by extrinsic proof . . . only as to matters which are not collateral, *i.e.* as to those matters which are relevant to the issues in the case and could be independently proven." III A Wigmore, *Evidence* §§ 1020-23 (Chadbourn rev. 1970) (other citations omitted).

Another formulation of this rule appears in *United States* v. *Masino*, 275 F.2d 129, 133 (2d Cir. 1960):

> When a witness is cross-examined to destroy his credibility by proof of specific acts of misconduct not the subject of a conviction, the examiner must

> be content with the answer and may not over objection produce independent proof to show falsity (citations omitted).

Although defense counsel has a legitimate interest in probing the credibility of opposing witnesses, *see United States* v. *Wolfson*, 437 F.2d 862, 874 (2d Cir. 1970), some line must be drawn. The collateral rule is necessary because the interjection of extraneous issues may confuse the jury. 3 J. Weinstein and M. Berger, *Evidence* ¶ 607(05) (1975). The attendant dangers of surprise and time-wasting are readily perceived. It would be nearly impossible to ". . . throw a light on matters in which every possible question might be suggested . . . and to raise every possible inquiry as to the truth of the statement made." Rolfe, B. in *Attorney General* v. *Hitchcock*, 1 Exch. 104, 154 Eng. Rep. 38 (1847). *See generally* McCormick, *Evidence* 97-100 (2d ed. 1972).

The matters on which defendant Joyce offered evidence were, in Judge Platt's words, "purely collateral" (1236). The true marital status of the witness Schoenly, whatever it may be, was not relevant to the issues of the trial. If Schoenly did in fact lie about his marital status, this would not show any general motive to falsify with regard to the issues in the case, and so would be a collateral matter.[16] *Compare Elgi Holding, Inc.* v. *Insurance Co. of North America*, 511 F.2d 957, 959 (2d Cir. 1975). This is not a case like *United States* v. *Wolfson*, *supra*, which approved the admission of extrinsic evidence to show a witness' particular motive to lie. *Id.* at 874. Since Schoenly's marital status was not by any stretch of the imagination relevant to a determination of Joyce's patricipation in the crimes charged or to an evaluation of Schoenly's mo-

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[16] Proof of a general motive to falsify is never collateral. *United States* v. *Lester*, 248 F.2d 329, 334 (2d Cir. 1957).

tive to testify, it is unnecessary to decide if it could be independently proven. *See United States* v. *Blackwood*, *supra*, at 531. Finally, it is important to note that Joyce's trial counsel failed to ask a single question in this area on cross-examination. The witness was therefore never given the opportunity to fully explain his marital status.

Like Schoenly's marital status, the nature of the termination of Boyles' employment was irrelevant to the issues of this case. At a sidebar Joyce's trial counsel stated:

> This next witness will testify that Mr. Boyle, rather than his job being abolished, was actually dismissed from his job for falsifying time cards in December of 1974; that he was having trouble with his union; was attempting to be reinstated (1237).

The proffered testimony might have brought into question Boyle's veracity on a collateral matter but, like the proffered testimony with regard to Schoenly, would not have touched on any relevant issue or have revealed any specific motive for Boyle to lie about Joyce's participation.

Joyce's trial counsel also stated that the proffered testimony ". . . goes to the heart of the matter because it's one of our contentions that Mr. Joyce was helping him get his job back due to Mr. Joyce's connection with various unions and the fact that he was a steward" (1237). While this could be relevant to the issues in the case by explaining Joyce's connection to Boyle in terms other than conspiracy, the testimony when and as presented was not "independently provable" and was therefore collateral. The testimony of the unnamed witness could only have shown that Boyle was in a position to seek reinstatement; not that Joyce consorted with Boyle for non-conspiratorial reasons. There was nothing in evidence, and

no evidence offered, to show that Joyce could actually return Boyle to his position. In fact, Joyce's counsel stated that Joyce would not testify with regard to this matter (1238). The trial court was not even apprised of the position of the unnamed witness, and so was unable to give Joyce the benefit of the doubt, that the witness' testimony might not have been collateral.

In the light of the sidebar presentation of Joyce's defense counsel, the judge properly deemed the proffered testimony "collateral". It is within the discretion of the trial judge to determine what is collateral impeaching material, and to reject it. *United States* v. *Blackwood*, *supra*, at 531; *United States* v. *Hiss*, 185 F.2d 822, 832 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); McCormick, *Evidence* § 47 (1954); 3A Wigmore, *supra*, § 1003. The testimony proffered by Joyce is just the sort the collateral rule was meant to exclude from evidence. Apart from the collateral nature of the evidence, the trial judge had the discretion to permit impeachment by extrinsic evidence, but it cannot be said that his failure to allow it was an abuse of discretion. *See United States* v. *Blackwood*, *supra*, at 531. It must also be kept in mind that both Schoenly and Boyle were extensively cross-examined by several defense counsel, including the counsel of appellant Joyce, regarding their agreements with the Government and all other conceivable motives to falsify their testimony. Examining the proffered testimony in the most favorable posture to appellant Joyce, it must be deemed collateral and not properly admissible extrinsic evidence.

Even if the trial court erred by rejecting the aforesaid testimony, the conviction of Joyce should not be reversed unless the error itself had substantial influence on the judgment of the jury. *United States* v. *Barry*, 518 F.2d 342, 349 (2d Cir. 1975), citing *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946). In view of the over-

whelming evidence against appellant Joyce, apart from the testimony of Schoenly and Boyle, any error in limiting this testimony was harmless.

In addition to Schoenly and Boyle, co-defendants Burns, Areiter, Nitti and Appellant Grimsley testified as to Joyce's direct participation in the crimes charged. Moreover, Detective Giordano testified that Joyce was present when Giordano negotiated with Boyle. Finally, Joyce had access to the stolen goods at his place of employment and was present at the garage in Brooklyn when the watches were finally "delivered" to Detective Giordano.

The Government submits that the allegedly impeaching testimony which would have been introduced through appellant Joyce's witnesses would have advanced his case only incrementally. It is inconceivable, therefore, that such testimony could have seriously affected the jury's consideration of Joyce's guilt. Any error in not permitting the testimony was harmless.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: August 9, 1976

Respectfully submitted,
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United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
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[17] The United States Attorney's Office wishes to acknowledge the invaluable assistance of John A. Records in the preparation of this brief. Mr. Records is a third year law student at New York University.

APPENDIX

FBI interview of Nick Terri,* April 3, 1975

NICK TERRI stated he is the owner of Terri's Restaurant at 245A Merrick Road, Lynbrook, New York (NY). He said he resides with his wife Sally, his daughter Janet and her three children, at 12 Harriet Place, Lynbrook, N.Y., telephone number 516-LY 9-8320.

Terri was advised by Special Agent (SA) Thomas P. Walsh, Federal Bureau of Investigation (FBI) in the presence of Detective Robert Klein, New York City Police Department (NYCPD), that they were investigating the theft of Timex watches from John F. Kennedy International Airport (JFKIA) and the storing of certain cartons in his basement on or about March 17, 1975. He was shown an "Interrogation; Advice of Rights" form which he read, but declined to sign. He agreed to answer questions about the cartons.

Terri stated he and his wife have owned and operated "Terri's Restaurant" in Lynbrook for the past 20 years. He said that one night about three or four weeks ago, an unknown male telephoned him at home and said he was going to drop off a carton for Janet, his daughter. Shortly thereafter, three or four men drove up in a truck and backed it into his driveway. They proceeded to unload many cartons on his closed-in porch, but then changed their minds and carried them through his living room and down into his basement. He said he did not know any of these men who unloaded the cartons and he insisted he did not know the contents of the cartons. He said his wife was sleeping at the time.

Terri continued that two days later, his daughter Janet returned from a skiing trip and he immediately told

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* This name is spelled "Teri" in the original FBI interview.

her to "take that shit out of the basement." She said she would do so. Terri admitted something was wrong with the cartons and he wanted them removed.

Terri stated that he never checked on his daughter to see whether she had the cartons removed from the basement. He just assumed that the cartons are no longer in his basement.

Terri insisted he did not know any of the patrons at the Tic Toc Bar in Lynbrook, and the name Donnie Walsh was not known to him.

The following description of Nick Terri was obtained from observation and interrogation:

Race	White
Born	November 21, 1908
Place of birth	Italy
Address	12 Harriet Place, Lynbrook, New York
Height	Five feet, six inches
Weight	130
Hair	Grey
Eyes	Brown
Build	Slim
Marital Status	Wife, Sally
Work	Owns "Terri's Restaurant 245A Merrick Road Lynbrook, New York
Tattoos	Tattoo of woman's face on left forearm and heart on right forearm

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 12th day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF AND APPENDIX FOR APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Daniel J. Sullivan, Esq.
250 Park Avenue
New York, N.Y.

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2 Pennsylvania Plaza
New York, N.Y.

Evelyn Cohen

Sworn to before me this
12th day of August, 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977